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Calendar No. 815

101st Congress *2d Session*	SENATE	Report 101-456

COMMUNICATIONS COMPETITIVENESS AND INFRASTRUCTURE MODERNIZATION ACT OF 1990

Mr. Hollings, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2800

September 12 (legislative day, September 10), 1990.—Ordered to be printed

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Calendar No. 815

101ST CONGRESS
2d Session

SENATE

REPORT
101-456

COMMUNICATIONS COMPETITIVENESS AND INFRASTRUCTURE MODERNIZATION ACT OF 1990

SEPTEMBER 12 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2800]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2800) to permit telephone companies to engage in video programming, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF BILL

The legislation permits a telephone company to offer transmission capacity for video programming and permits users of telephone network capacity to offer video programming services without obtaining a franchise pursuant to section 621 of the Communications Act of 1934 (Communications Act) if these services are offered over facilities integrated into the public switched telephone network, if the telephone company has no editorial control over or other involvement in the content of the programming, and if these services are offered on a regulated common carrier basis. The legislation also requires the Federal Communications Commission (FCC) to complete within one year (1) a report to Congress on the benefits and costs of S. 2800, as introduced, which would include an exhaustive study of the entire question of telephone company provision of video programming services, and (2) an examination of whether the

existing rural exemption in section 613(b)(3) of the Communications Act ensures that all areas of the country have access to landline multichannel video service as soon as possible.

Background and Needs

THE CABLE-TELEPHONE CROSS-OWNERSHIP STATUTE

Current law, section 6131(b) of the Cable Communications Policy Act of 1984 (Cable Act), allows telephone companies to own or control video programming only outside of their telephone franchise areas. An exception to this prohibition exists for rural areas (defined as areas with fewer than 2,500 residents). In addition, the FCC may waive the restriction if the telephone company demonstrates that video service could not exist except if offered by the telephone company or if the telephone company demonstrates that exceptional circumstances exist. The FCC has used this latter test to grant a waiver for General Telephone to build cable facilities using fiber optic cable in Cerritos, California.[1] This grant has been challenged and should soon be decided by the court.[2] The AT&T divestiture decree's information services restriction bars the Bell Operating Companies (BOC's) from providing cable television services outside as well as inside their telephone service areas.

While the telephone companies are restricted from providing video programming, they are able to build and lease facilities for cable systems operated by others. This requires regulatory approval from the FCC, but it is usually granted. In Washington, DC for instance, Bell Atlantic built the coaxial plant for District Cablevision.

The roots of the cable-telephone restriction can be found in the Department of Justice's 1949 suit against AT&T. The suit alleged anticompetitive acts arising from the Bell System's control of the local telephone bottleneck. In the resolution of this suit in 1956, AT&T agreed not to own or control information content, including cable television systems.[3]

Some 10 years later, the FCC, acting on a series of complaints about anticompetitive practices by independent telephone companies, became more interested in overseeing the offering of cable television services. The FCC began to require telephone companies to file tariffs covering their cable offerings.[4] The FCC then investigated these tariffs, as well as the telephone companies' policies concerning use of their poles by cable systems. While considering these tariffs, the FCC embarked on another proceeding, culminating in a decision requiring that telephone companies obtain section 214 (common carrier) facilities authorization approval prior to constructing cable facilities.[5] It was clear in this decision that the FCC as a matter of course, would not approve such facilities authorization if the telephone company also provided cable service.

In 1969, the FCC began to examine whether additional limitations should be adopted.[6] A year later, the FCC decided that it

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[1] *General Telephone Company of California*, 4 FCC Rcd. 5693 (1989).
[2] *National Cable Television Association* v. *FCC*, U.S. Court of Appeals (D.C.), No. 89-1517. Oral argument was held on May 8, 1990.
[3] *United States* v. *Western Electric Co.*, Civ. Action No. 1749 (D.C. N.J. 1956).
[4] *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257 (1966).
[5] *General Telephone Company of California*, 13 FCC 2d 448 (1968).
[6] *Notice of Inquiry and Notice of Proposed Rulemaking*, Docket No. 18509.

would be in the public interest to adopt a rule prohibiting telephone companies from offering video programming in their franchise areas.[7] This action was immediately taken to court, but the court upheld the FCC both on public interest and constitutional grounds.[8]

Despite challenges by the telephone industry, the FCC maintained these rules throughout the 1970s and early 1980s. The Congress then codified these rules (with minor changes) in the Cable Act.[9] In support of this provision, the House Report states:

Section 613 establishes clearly-defined cross-ownership rules and standards to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets.[10]

In 1988, the Department of Commerce's National Telecommunications and Information Administration (NTIA) conducted a study of the cable television industry, including a review of the telephone/cable cross-ownership ban. NTIA concluded that the cross-ownership rule should remain, but that telephone companies should be permitted to provide cable series on a common carrier basis as part of their public switched network. In 1988, the FCC initiated a proceeding to review the telephone/cable cross-ownership limitation and tentatively concluded that telephone companies should be permitted to provide video programming within their telephone service areas, with non-structure safeguards. The FCC has not announced whether it will make this tentative conclusion final.

S. 2800, AS INTRODUCED

As introduced, S. 2800 would remove the cable-telephone cross-ownership limitation of the Cable Act and replace it with a series of safeguards designed to prevent anticompetitive acts by telephone companies. The bill would not amend the information services restriction of the AT&T divestiture decree.

The goals of S. 2800 as introduced were stated by Senator Burns when he introduced the legislation:

> The Burns bill, the Communications Competitiveness and Infrastructure Modernization Act of 1990, permits limited telco competition in cable and programming services. Enactment of the bill will greatly accelerate the rate of fiber deployment in the United States and inject needed competition in the video programming marketplace.[11]

S. 2800, as introduced, thus sought to permit telephone company control of video programming as a way to encourage competition to the cable industry and development of an optic fiber, broadband telephone network. As introduced, S. 2800 would:

—prevent telephone companies from occupying more than 25 percent of their cable channel capacity with their own programming;

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[7] *Final Report and Order*, 21 FCC 2d 307, *reconsideration* in part, 22 FCC 2d 746 (1970).
[8] *General Telephone Co. of the Southwest* v. *United States*, 449 F.2d 846 (1971).
[9] Section 613(b) of the Cable Act.
[10] House Report 98-934, p. 55.
[11] Congressional Record, June 28, 1990, S8957.

—bar telephone companies from buying out existing cable operators in their local service areas, unless the FCC and local franchising authorities approve;
—expressly prohibit cross-subsidies of video services with telephone revenues;
—require a separate subsidiary for the marketing of video programming services, unless the telephone company serves a rural area with fewer than 20,000 residents, or the FCC grants a waiver upon the showing of good cause;
—exempt from cable rate regulation any telephone company that serves a community with fewer than 20,000 residents, unless its cable rates have increased more than five percent per year since deregulation, or ten percent or more of its video customers have filed formal complaints; and
—exempt rural telephone companies' cable operations from all other regulations, such as the separate subsidiary and cost allocation requirements.

THE DEBATE ON REPEALING THE CABLE-TELEPHONE CROSS-OWNERSHIP STATUTE

At the heart of the debate over repealing the cable-telephone cross-ownership statute is the question of whether the potential benefits of telephone entry into the video programming business outweigh the potential for anticompetitive harm. The telephone industry and other groups who support S. 2800, as introduced, argue that Congress should reexamine the policy balance reflected in the codification of the cross-ownership requirement. They argue that it is better to have greater competition to the cable industry, rather than greater regulation, and that the telephone companies can provide such competition. In addition, they argue that there are adequate safeguards to address any anticompetitive problems. Finally, they stress that more is at stake than simple competition to cable. They believe that if telephone companies are permitted to offer video programming, they will accelerate the development of an optic fiber, broadband network, enhancing our country's competitiveness and bringing innovative services to the consumers.

Certain users of the network and competitors do not agree that these benefits will occur. They claim that anticompetitive acts will certainly follow such entry, and that regulators are incapable of policing these acts. Moreover, they argue that while such acts are intolerable in any case, they are especially troublesome when they involve the flow of information content. They argue that prevention of such anticompetitive activity was the reason the cross-ownership requirement was adopted in the first place by the FCC and later codified by Congress.

COMPETITION TO CABLE

In ordering reported cable television legislation (S. 1880, the Cable Television Consumer Protection Act) in June 1990 the Committee found that many cable operators possess significant market power and that this market power has resulted in a variety of problems. While the Committee believes that greater competition should be the ultimate remedy, it decided that it should provide for

greater regulatory oversight during the transition to competition. The authority to regulate cable rates, for instance, no longer exists under S. 1880 as reported once the cable operator faces competition from television stations and another cable operator or other multichannel video provider.

Whether a telephone company can compete with a cable system and when this would occur depends on the type of facility constructed. If the cross-ownership statute were repealed, a telephone company could build a stand-alone, competing coaxial cable system. According to testimony received by the Committee, this system would be the cheapest way for a telephone company to bring video programming services into the home.[12] However, in effect, this system is the same as an overbuild by a second cable operator. From the extensive evidence presented to the Committee over the past year, it is clear that the economies weigh strongly against such an overbuild, and favorable economies for such an overbuild exist only rare cases.[13]

AN OPTIC FIBER, BROADBAND NETWORK

Instead of building coaxial plant, the telephone company could replace its cooper wires with optic fiber cable. The current cooper plant can be used for telephone calls, computer transmissions and other services, including a compressed digital video signal; however, it cannot provide multichannel video capability. At the moment, the price of cooper installations is lower than optic fiber, but the telephone industry believes that it can economically justify laying optic fiber "to the curb" for new areas by 1993 and "to the home" by 1995.[14] The telephone industry further believes that this greater deployment of fiber will result in lower prices for optic fiber cable, thus adding impetus to replace existing cooper plant.[15] One company, Bell Atlantic, believes it can bring fiber "to the curb" to all its customers by 2010.[16]

A recent FCC staff report on the deployment of optic fiber broadband plant concludes that it will reach between 8 percent and 18 percent of the households by 2000.[17] A 1989 Bellcore projection supports this view, concluding that the entire nation will be wired with fiber sometime between 2010 and 2025, depending upon the drop in costs, the network architecture, and the aggressiveness of the telephone companies.[18] From these reports and from the testi-

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[12] Residential Broadband Services by Telephone Companies? Technology, Economics, and Public Policy," Leland L. Johnson and David P. Reed, Rand Corporation, June, 1990, p. 51. Also, *see*, testimony of Leland L. Johnson, Senate Commerce Subcommittee on Communications Hearing on S. 2800, July 24, 1990.

[13] See, "Report on the Cable Televison Consumer Protection Act of 1990," #101-381, pp. 12-13.

[14] The telephone industry has been conducting trials of various architectures of fiber-to-the-home since 1986, with the number of trials accelerating in the past year. According to a study by Braxton Associates (Appendix I) for the Telecommunications Industry Association, there are about 25 trials now ongoing, all of which are being conducted by six of the BOCs and three large independent telephone companies. There are about 4000 residences now served by optic fiber cable in these trials. Most of the services provided in these trials are similar to traditional telephone services. Some of the trials include cable service, but none of the trials has yet to offer video on demand services.

[15] See, testimony of Dean Swanson and Hal Selander, Senate Hearing on S. 2800.

[16] "Network of the Future," Bell Atlantic, 1990.

[17] "Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy and Institutional Change," OPP Working Paper #24, Robert M. Pepper, November, 1988, p. 101.

[18] "Cost Projections for Fiber in the Loop", *IEEE*, Paul Shumate, February, 1990.

mony noted above, the telephone industry soon will begin an intensive program to deploy optic fiber cable; however, because of numerous factors—economic as well as technical—it appears unlikely that there will be extensive deployment of broadband facilities in the next 10 years.[19]

CONTROL OF CONTENT

Those who support lifting the current cross-ownership provision and allowing the telephone companies to own and control programming claim that if they were permitted to engage in this activity, the deployment of fiber would be greatly accelerated.

> With the ability to participate in programming, the pace of broadband deployment will be significantly propelled forward, but the telephone companies need to know that if they expend the resources to install a broadband network it will have users even if those users are affiliated with the telephone company. Otherwise, the expenditures necessary to develop that network will be little more than a gamble rather than a prudent business decision.

(Testimony of Kent Foster, President, GTE Telephone Operations)[20]

The supporters of lifting the cross-ownership provision argue that the United States is falling behind the rest of the world in developing its telephone network and that by permitting them to own or control video programming, the telephone industry will have the incentive to ensure that the United States continues to have the best telephone network in the world.

> There has been a recognition abroad of the contribution telecommunications makes to economic competitiveness at both the firm and national level. This realization has brought about regulatory reform and other forms of governmental encouragement resulting in an accelerated modernization of telecommunications networks as various countries prepare themselves to be vigorous participants and competitors in the information age. While initially the unequivocal leader, the U.S. domestic telecommunications environment has, in a relative sense, stagnated under a legal and regulatory structure that is biased against aggressive network investment and modernization. At the same time, Europe and the Far East are moving ahead.

(Testimony of Kent Foster)[21]

Another argument advanced in support of allowing telephone companies to own and control programming is that the cable industry and other video distributors have tied up all, or most, of the programming sources and that these programmers will not use the telephone company's broadband plant.

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[19] "Residential Broadband Service by Telephone Companies?," p. 51.

[20] Senate Hearing 101-702, p. 331. Also, see testimony of Dean Swanson and Hal Sleander, Senate Hearing on S. 2800.

[21] Senate Hearing 101-702, p. 335.

The supporters of the cross-ownership restriction dispute these arguments. First, they argue that there is evidence that programmers make rational decisions about the best means of distribution and that they use distribution means other than cable.

Second, they contend that if programmers are beholden to, or are somehow in the grasp of, the cable industry, this problem should be dealt with directly. Moreover, they argue that the issue was addressed by the Committee in the non-discrimination provisions of its cable legislation, S. 1800 as reported. In considering S. 1880, the Committee found that cable operators may use their market power to obtain more favorable deals with programmers than would have occurred in an effectively competitive marketplace. S. 1880 explicitly provides that cable programmers cannot unreasonably refuse to deal with other video distributors and cannot discriminate in price, terms, and conditions if this would impede retail competition.[22] Thus, if this cable legislation is enacted into law, programmers should be able to make decisions about the mode of distribution unfettered by any market power, and they would choose distribution on the telephone network assuming it was an economically attractive means of reaching the viewer.

Third, they argue that no law today prohibits the telephone industry from marketing the services and facilities of its telephone network. The industry does so, actively seeking users to sign up for various services, such as high capacity private line services. It certainly can do so in the future, trying to get programmers to use the network's capacity.

Fourth, they argue that the programming business is a very difficult one. At best, programmers may control a few channels (for instance, Turner Broadcasting with CNN, TNT, and TBS). More common are the programmers who put together one or two shows. Some contend that a company with no experience in the programming business—or in the program packaging business—would be unlikely to put together the large number of channels needed to justify the great expenditure required to accelerate deployment of a broadband network.

Fifth, they assert that even if the telephone companies were successful programmers, the amount of revenue gained through video services is significantly less than the cost of a broadband telephone network. The total revenues in the cable industry today approximate $15 billion. The expected cost of a nationwide broadband network is anywhere from $200 billion to $400 billion. Even if the telephone companies were able to capture all of the cable industry's revenues, the supporters of the restriction contend, the return on investment for building this network would be very low. They argue that the telephone industry would obtain better returns from putting its money in much safer investments.[23]

The telephone companies, however, claim that they will reap revenues far in excess of the cable industry because they will offer a vast array of new services.

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[22] See section 640—"Nondiscrimination With Respect To Video Programming."
[23] See, Testimony of John F. McLaughlin, Senate Hearing 101-702, pp. 355-361.

> Well, there are a number of applications. One is video on demand, a service we are testing now in Cerritos. Basically, that involves the consumer deciding what he wants to watch and when he wants to watch it and being able to access that particular video when he was fit. You also delay or see things when it is appropriate for the individual.
>
> For example, if CBS wanted to offer over our network consumers access to their evening news. When you come home you could start CBS Evening News when you are ready to watch it. You could stop it if you had to leave the room, and you could come back and start it again. So it is being able to select from a library of videos . . .

(Testimony of Kent Foster) [24]

The opponents of repeal claim that there is on evidence of demand for new services such as video on demand. They also argue that many of the services discussed above are available today through use of other video distribution technologies (for example, one can use a video cassette recorder to delay watching the CBS Evening News).[25]

Finally, the opponents of repeal argue that the United States is not in jeopardy of falling behind other nations in development of a broadband network. An examination of European countries and Japan shows that they are at the same stage, if not behind us, in developing this type of network. For example, the following was the conclusion of a recent study of Japan's development of a broadband network:

> As for the telephone companies, NTT, a dominant carrier, cannot provide even channel service for cable operators at the moment. Although actively working on narrowband ISDN and B[roadband]-ISDN, NTT probably will postpone plans for fiber-to-the-home in the 1990s, due to a number of problems that the company currently faces.[26]

THE COMMITTEE APPROACH

The Committee examined carefully the arguments of proponents and opponents of repeal of the cable-telephone cross-ownership statute, and concluded that the Committee could not at the present time support repeal. Instead, it adopted a two-part approach.

1. If a telephone company integrates video capacity into its public switched network, if it has no editorial control over or other involvement in the content of the video programming, and if it offers video capacity on a regulated common carrier basis, the telephone company and its users do not have to obtain a cable franchise.

2. The FCC within one year shall complete (A) a report to Congress on the benefits and costs of S. 2800, as introduced, including an exhaustive examination of all issues surrounding

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[24] Senate Hearing 101-702, p. 396.

[25] See "Residential Broadband Services by Telephone Companies," p. vi.

[26] "Cable Television and Telephone Companies: Towards Residential Broadband Communications Services in the U.S. and Japan (Draft)," Naoyuki Koike, Harvard University Program on Information Resources Policy, April 1990, p. 169.

the cross-ownership restriction, and (B) a proceeding to review the definition of "rural area" to ensure that all areas have access to multichannel video services over cable or optic fiber wire as soon as possible.

The first part of the Committee's approach is the so-called video dial tone provision. This proposal was forwarded by the NTIA in its 1988 report, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations.*[27] In providing video dial tone, telephone companies would continue to operate only as common carriers but without control or ownership of content. However, because telephone companies are already regulated at the State level, neither the telephone company nor its users would be required to obtain a cable franchise. State regulatory commissions have the necessary authority to oversee investments to ensure they are prudent and useful and to oversee rates to ensure they are reasonable and non-discriminatory.

The Committee strongly believes the telephone industry should have the proper incentives to make economic investments to develop and upgrade its network. The development of the public switched network is important to domestic economic development as well as U.S. international competitiveness. The Committee believes that by eliminating unnecessary regulations—the cable franchise requirement—the opportunities are enhanced for telephone companies to bring innovative facilities and services to the American public. At the same time, because of concerns about the potential for anticompetitive practices by telephone companies and the need to ensure media diversity, the Committee is not now prepared to permit telephone companies to own or control video programming.

The Committee wants the expert agency, the FCC, to examine the question of benefits and costs that would flow from repeal of the statute. It also is interested in ensuring that rural areas obtain the same type of video services that exist in more populated areas. The informaton obtained from an FCC review of these issues will be useful in later deliberations on these matters.

Legislative History

S. 2800, the Communications Competitiveness and Infrastructure Modernization Act of 1990, was introduced on June 27, 1990 by Senator Burns. Senators Dole, Gore, Danforth, Ford, Gorton, McCain, Lott, and Bond are cosponsors.

A hearing on S. 2800 was held on July 24, 1990. An Administration witness and two panels of other witnesses testified. The Administration witness, Thomas Sugrue, Deputy Assistant Secretary for Communications and Information Policy, Department of Commerce, testified in support of S. 2800, as introduced. The witness for the telephone industry, Dean Swanson, President of Standard Telephone Company, as well as Hal Selander of Braxton Associates and Professor Robert Harris of the School of Business Administration of the University of California at Berkeley, supported S. 2800 as introduced. Witnesses who testified on behalf of the cable, broad-

[27] NTIA Report 88-233, pp. 32-60.

cast, and newspaper industries opposed the bill, as did Leland Johnson of the Rand Corporation and Ronald Binz of Colorado's Office of Consumer Counsel.

On July 31, 1990, the Committee, by voice vote, ordered S. 2800 reported favorably, adopting an amendment in the nature of a substitute. This substitute contains the video dial tone provision and the requirement that the FCC within one year (1) report to Congress on the benefits and costs of S. 2800, as introduced, as well as on all of the issues surrounding this bill, and (2) review the "rural area" definitions so as to ensure all areas are served with a multichannel video distributor by cable or optic fiber wire as soon as possible.

Summary of Major Provisions

Section 2. The FCC is to report to Congress within one year of the date of enactment of this legislation on the benefits and costs of S. 2800, as introduced. This report shall be exhaustive and include a discussion of the cable-telephone cross-ownership statute, possible safeguards against anticompetitive conduct, and the deployment of optic fiber cable.

Section 3. If a telephone company deploys video capacity in its public switched network, if it has no editorial control over or other involvement in video program content, and if it offers its capacity on a regulated common carrier basis, the telephone company and its users are not required to obtain a cable franchise.

Section 4. The FCC is required to complete a proceeding within one year to review the "rural area" definition to ensure that all areas of the country have access to multichannel video service over cable or optic fiber wire as soon as possible.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1984, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 27, 1990.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 2800, the Communications Competitiveness and Infrastructure Modernization Act of 1990, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on July 31, 1990. We estimate that the bill would result in costs to the federal government of about $200,000 in fiscal year 1991 and $100,000 in fiscal year 1992, assuming appropriation of the necessary amounts.

S. 2800 would require the Federal Communications Commission (FCC) to undertake and complete within one year two proceedings on cable television and the video programming offered over cable

television. First, the FCC would be required to examine the costs and benefits of the bill as introduced, including the issues of ownership and control of cable systems and video programming by telephone companies. Second, the FCC would be required to review the definition of "rural area," in which the current restrictions on ownership by telephone companies are waived. According to the FCC, the subjects that would be covered in the proceedings are already being addressed to some extent in the commission's ongoing activities.

Based on information from the FCC, CBO estimates that it would cost the Commission an additional $200,000 in 1991 to prepare orders, meet with interested parties, and respond to the inquiries that would result. In 1992, CBO estimates that the FCC would spend about $100,000 to review and analyze comments about the orders.

The bill also would exempt telephone companies that provide video programming to subscribers or video programmers that broadcast their programming through the telephone companies from being required to obtain a cable television franchise. CBO estimates that local franchising authorities, either city or county governments, could lose future revenue from franchise fees to the extent that telephone companies compete with existing cable television franchises and reduce the number of cable franchises. However, any potential revenue loss would depend on the development of telephone companies' video capability, which is uncertain at this time.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Laura Carter, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of the rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The video dial tone provision will have a significant effect on lessening regulation since it eliminates, under certain specific situations, the requirement that telephone companies obtain a cable franchise prior to offering video programming services. As for the two FCC proceedings, neither should cause the FCC to impose additional regulation without further legislative action.

NUMBER OF PERSONS COVERED

The video dial tone provision applies to all the telephone companies and all users of its network. The two FCC proceedings will affect all parties interested in the debate over the cable-telephone cross-ownership statute.

ECONOMIC IMPACT

By easing a significant requirement to the entry of telephone companies into the provision of video program services, the legisla-

tion should increase competition and enhance economic development.

PRIVACY

The legislation will not have any adverse impact on the personal privacy of individuals covered.

PAPERWORK

The video dial tone provision eliminates the need for telephone companies to obtain cable franchises in certain instances and thus will lessen paperwork. The two FCC proceedings should result in no additional paperwork burdens.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This legislation may be cited as the "Communications Competitiveness and Infrastructure Modernization Act of 1990".

SECTION 2.—EXAMINATION OF COSTS AND BENEFITS

Under section 2, the FCC is required to begin a proceeding within 60 days of the date of enactment of the legislation to examine the benefits and costs of S. 2800, as introduced. The Committee intends for this study to be an exhaustive analysis of all the issues surrounding the debate over the cable-telephone cross-ownership statute. Among the issues to be reviewed are the extent to which telephone companies should be permitted to own or control information content, the adequacy of safeguards against anticompetitive acts, the development of the telephone net work and the deployment of optic fiber wire, and the requirements of rural areas. The FCC shall complete this report and send it to the Congress within one year of the date of enactment of the legislation.

SECTION 3.—RELIEF FROM FRANCHISE REQUIREMENT

Section 3 provides that telephone companies may offer video programming transmission and related capabilities and that users of the telephone network may distribute video programming services without obtaining a cable franchise pursuant to section 621 of the Communications Act if three specific conditions are met:

1. such service must be integrated into the public switched telephone network;
2. the telephone company has no editorial control over or other involvement in the content of the video programming; and
3. such services are offered on a regulated common carrier basis.

Each of these conditions is critical, and the following paragraphs provide a more detailed explanation of each one of the requirements.

Integration of Services into the Public Switched Network.—The telephone network used by residential subscribers and most business subscribers is generally termed the public switched network. This network operates by linking subscribers through switches

rather than by linking directly each subscriber to every other subscriber. The contrast to this type of network is a private line network, which provides direct lines between locations. Telephone companies often provide such private lines for businesses that transmit large amounts of information between specific sites.

The key to distinguishing the public switched network from a private line network is functionality. The public switched network permits any person to reach any other person.[28] In contrast, a private line network restricts the persons that can be reached.

It has been suggested that another way to distinguish the public switched network from a private line network is to examine the network architecture. While such an approach may have some validity in examining the existing telephone networks, these networks may well evolve and change over time. It would be too restrictive to take a snapshot of the networks as they operate today and lock them into policy. Such a view may cause the Committee's intent to be frustrated and also may inhibit network development. Thus, the functionality test is the superior test in distinguishing between the networks for the purposes of this section.

The purpose of this condition is to ensure equal regulatory treatment if a telephone company simply deploys stand-alone (separate) coaxial cable or fiber optic wire. Stand-alone plant is the same as an overbuild by any person and thus should be subject to the cable franchise requirement. For example, as noted earlier, Bell Atlantic has installed coaxial cable for the cable operator in the District of Columbia that is in no way a part of its public switched telephone network. If Bell Atlantic were to install such cable so that it could offer video programming services,[29] it would be stand-alone plant and should be treated no differently than the plant used by the District of Columbia cable operator. It thus would not satisfy this first condition and would need to secure a cable franchise.

Stand-alone plant is separate from other plant at the headend (where the signals are combined and transmitted) to the subscriber. In such plant, there is no or *de minimus* integration with facilities delivering public switched voice and data services or with the functions required for such services. For a telephone company's plant delivering video services to be considered integrated into the public switched network, the voice, data, and video services all must be transmitted from the central office switch over the same wire. The network architecture outside the central office is of less significance. For example, a telephone company may decide that it makes the most technical and economic sense to transmit over optic fiber wire from the central office to just outside the residence and from there to send the various signals into the home by multiple wires (copper, coaxial, or optic fiber). Such a transmission system would

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[28] In other words, the public switched network has the purpose of providing service universally. This does not mean that all facilities and services have to be provided immediately to all subscribers. It is understood, for example, that a broadband telephone network will be constructed over many years and that video transmission may be offered to some subscribers before others. However, the characteristic of universality—along with the responsibilities of a common carrier—requires that over a reasonable time these capabilities are to be offered to all subscribers seeking such capabilities.

[29] The legislation, of course, does not alter any existing content prohibition in statute or court decree, and thus Bell Atlantic is barred from owning or controlling information content, including cable programming.

not be considered stand-alone plant and could meet this first condition.

No Editorial Control Over or Other Involvement in Content.—The fundamental principle in the cable-telephone cross-ownership statute is that telephone companies shall not be able to own or control program (information) content. As stated heretofore, the Committee is not now prepared to alter this statute. Rather, the reported bill changes the franchise requirement if specific conditions are met. Telephone companies continue to be subject to the requirement that they can only provide the capability to transmit video programming offered by other persons. They may have no editorial control over or other involvement in program content.

As intended by Congress and interpreted by the FCC, the scope of prohibited content activities is broad. The legislation does not change this interpretation. For example, the so-called packaging of programming continues to be prohibited. In general, the telephone companies in no way are to be involved with choosing what goes on its broadband telephone network and are prohibited from discriminating in favor of or against any video programmer.

Telephone companies, however, may continue to market their network facilities and services. Telephone companies engage in this activity now, for example, by marketing high capacity DS-3 and T1 lines to businesses. It is expected that telephone companies will continue this practice and attract video programmers onto the broadband telephone network.

Telephone companies also can provide subscribers with a video "gateway", so long as all the underlying services required to operate a "gateway" are offered on a nondiscriminatory basis. Such as "gateway" offers a content-neutral menu of the programming services available over the integrated broadband network and may include other services that the FCC determines can help to make video programming more accessible to the subscriber without involving the telephone company in the ownership, control, or manipulation of video programming.[30]

Finally, it is important to note that the BOCs are currently subject to the information services restriction in the AT&T divestiture decree, known as the Modification of Final Judgment (MFJ). The legislation does not affect in any way the status of this restriction, that is, to make it more or less stringent. The BOCs may continue to engage in whatever they are permitted to engage in today. If the MFJ's information services restriction were to be relaxed or lifted entirely and if the cable-telephone cross-ownership statute remained in effect, the BOCs still would have to comply with the "no content" mandate of the statute.[31]

Services Offered on a Regulated Common Carrier Basis.—The final condition requires that the telephone company seeking to provide video transmission services must be a regulated common carrier. Today, because of their local monopoly, telephone companies are subject to both Federal and State regulatory oversight, which is

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[30] The FCC, of course, cannot permit the BOCs to engage in activities in the gateway that are prohibited by the MFJ.

[31] The Committee recognizes that there might be some easing of the MFJ restriction that would fall short of involvement in program content.

designed to ensure that telephone companies operate in the public interest. The Committee intends that this oversight continue. So long as the telephone companies continue to have control over bottleneck facilities, it is fundamental that the Government ensure that rates reasonable and that access is provided to all on a nondiscriminatory basis. In addition, State regulators should continue to oversee the investment in plant (such as optic fiber cable and optic switches) to ensure that such investments are useful and prudent. In sum, the Committee intends that the legislation not limit in any way the authority of the FCC or state public utility commissions to scrutinize applications to construct broadband networks and to impose conditions on the construction of such networks.[32]

SECTION 4.—EXAMINATION OF RURAL WAIVER

The FCC is required to complete a proceeding within one year of the date of enactment of the legislation to review its definition of a rural area. The goal of this review is to ensure that all areas of the country have access to a multichannel video service over cable or optic fiber wire as soon as possible. The FCC also shall ensure that its policies foster the widest diversity of information services for the public.

[32] The purpose of the legislation is to remove the cable franchise (section 621) requirement under specific conditions. If the state public utility commission is authorized to grant such franchises, the legislation would nullify this authority for telephone companies if the specific conditions are met. However, as stated here, the legislation does not alter the authority granted it to oversee the operations of telephone companies.

ADDITIONAL VIEWS OF MR. BURNS RE S. 2800: THE COMMUNICATIONS COMPETITIVENESS AND INFRASTRUCTURE MODERNIZATION ACT OF 1990

I. INTRODUCTION

The Committee is to be commended for its support of this bill which, I believe, is a constructive and significant first step toward a competitive response to the current cable problem.

By this action, the Committee clearly indicates its support for the deployment of modern technology in the telephone network and recognizes the importance of that network to domestic economic development and American international competitiveness.

To further this objective, S. 2800, as reported by the Committee, permits all telephone companies to provide "video dial-tone" service in their telephone service areas. Specifically, a telephone company is not permitted to have editorial control over, or other involvement in, the content of the video programming which it carries. However, as a necessary part of "video dial-tone" service, a telephone company must, at a minimum, be permitted to provide marketing services, billing and collection services, storage and transport services, and video gateway services (including welcoming screens, menus of available programming, and other navigational aids and features that emerge to facilitate use by consumers and programmers). Such activity is absolutely essential if the purposes of S. 2800 are to be achieved and if "video dial-tone" service is to be economically viable.

S. 2800, as reported by the Committee, also requires the Federal Communications Commission (Commission or FCC) to consider the benefits and costs of permitting telephone companies to have a more expanded role in the provision of video services to telephone subscribers. It also requires the FCC to conduct a comprehensive study and make a report to Congress (together with Commission recommendations) which will form the basis for additional action in the next Congress.

While I would have preferred that the Committee resolve the policy issues raised by telephone company provision of video programming, I can appreciate the Committee's desire to ensure that the implications of that decision be fully studied and analyzed by the Commission prior to acting on S. 2800, as introduced.

My views, as author of S. 2800, are intended to assist the Commission by providing insight into the permissible activities under "video dial-tone" service and in fulfilling its obligations to provide the Committee with its expert judgment on the "benefits and costs of S. 2800, as introduced."

II. BACKGROUND

Since passage of the Communications Act of 1934, national telecommunications policy has sought "to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151.

When that commitment was made, American telecommunication's technology was still in its infancy; satellites, fiber optics and other advanced network capabilities were yet to come. Today, technological and economic changes are forcing us to establish new long range international and domestic telecommunications and informational goals and a regulatory climate which will ensure the development and deployment of these new technologies.

Unfortunately, during the past 60 years, there has most often been an unnecessary delay betweeen technological achievement and the availability of its benefits to all of the people of the United States.

A. National Cable Television Policy Vacuum

Cable television is a case in point. Cable, which was first used, literally, as a community antenna television service, has been available since 1948. But today, even with 10,823 cable television systems providing service to over 53,900,000 subscribers or 58.6% of American television households, many Americans do not have access to cable television service and throughout the United States, rural residents cannot even receive over-the-air television signals without expensive satellite receivers.

Much of the blame for this failure to implement our national policy commitment with respect to cable television can be attributed to federal inaction and specifically to the lack of a comprehensive federal policy. The American people, of course, were the ultimate losers. Throughout the 1950's and 1960's, despite Congressional urging to the contrary, the FCC maintained that the law gave it no jurisdiction over cable, and an effort to enact legislation was tabled by a one vote margin in the United States Senate.

By degree, during the 1970's the FCC began to assert its jurisdiction over cable in an effort to promote its orderly growth while at the same time ensuring the viability of over-the-air broadcasting. But even here, the chaos and uncertainty was exacerbated by numerous challenges to the FCC's actions in the courts, and by the activities of state and local public franchising authorities. Copyright legislation in 1976 and a Pole Attachment statute in 1978 gave some impetus to the growth of cable.

Finally, in 1984, Congress found it necessary to enact comprehensive legislation to establish a national policy concerning cable communications to ensure that competing state and local regulation did not frustrate the availability of this service to the American people. While the 1984 Cable Act has achieved one of its major objectives—the growth of cable, it has failed to ensure another—effective competition from other competing mediums capable of providing the cluster of services found in cable. Spiraling cable rates and wide-spread service complaints have been a painful consequence of this failure.

B. The Advanced Broadband Network Challenge

While the delay in making cable service available to all American consumers is a serious failure of our national telecommunications policy, a much broader challenge is presented by the advent of fiber optics and the advanced broadlband network capabilities available through deployment of that technology. Unless policy decisions are made on a timely basis, American consumers will be forced to wait for new services that would improve the quality of their lives made possible by these and other advanced network technologies. How long must they wait for the services which broadband technology can now provide? Such a network has the capability to:

Bring a wide array of information and data services to both home and businesses;

Balance and reduce the individual cost of these services;

Make these new services, including cable television, available to the largest possible universe of consumers, including those in rural America;

Serve as an alternative and competitive video programming delivery system for numerous programmers and users; and

Provide third parties, in a user friendly way, with the ability to deliver video, enhanced data bases, educational services, shopping and banking at home, computer storage, movies, sports, video information retrieval, and local community programming.

For the American people to realize, in timely fashion, the benefits of this new technology, two inter-relatred obstacles must be overcome:

The accelerated investment necessary to rewire America with fiber; and

The outmoded and unnecessary restraints in the Cable Act of 1984 which prohibit the one industry group with the capital and expertise required for rewiring from doing so.

C. History of Telco/Cable Cross-Ownership Prohibition

The FCC adopted its telephone company/cable cross-ownership rules in 1970 following a rulemaking proceeding which it had initiated a year earlier. The rules prohibit the provision of cable television service by telephone company within its telephone service areas and restrict the relationship between a telephone company and a provider of cable service to that of a carrier and user. *See applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order),* 21 FCC 2d 307, *recons. in part,* 22 FCC 2d 746 (1970), — *aff'd. sub nom., General Telephone Co. of S.W.* v. *United States,* 449 F.2d 846 (5th Cir. 1971).

The Commission provided for waivers of its rules where it could be shown that cable television service could not be provided except through a system affiliated with the local telephone company "or upon other showing of good cause." *See* 47 C.F.R. Sec. 63.56. The Commission subsequently determined that a presumption existed that cable television service would not be otherwise available in areas where there were less than 30 homes per cable route mile.

See Report and Order, Docket 78-219, 82 FCC 2d 233 (1979). The FCC later created an exemption to the rules for rural areas which were not served by an independent (i.e., non-affiliated) cable system. *See Report and Order,* CC Docket 80-767, 88 FCC 2d 564 (1981).

With the enactment of the 1984 Cable Act, P.L. 98-549, 98 Stat. 2779 (1984), Congress "codified" the FCC telephone/cable cross-ownership rules. The 1984 Cable Act further liberalized the rural waiver provision by making it clear that telephone companies in rural areas could provide cable service whether or not an independent system existed. The 1984 Cable Act also defined affiliation for purposes of the rules in terms of ownership or control.

In 1987, the Commission initiated a review of the telephone/cable cross-ownership restrictions. *See Telephone Company/Cable Television Cross-Ownership Restrictions (Notice of Inquiry),* 2 FCC Red 5092 (1987) ("Cable NOI"). In its Cable NOI, the FCC asked for comments on whether the basis for the rules was still valid in light of a changing marketplace and on the relative costs and benefits of the rules. In response to the comments on its Cable NOI, the Commission proposed amending its rules to permit telephone companies to "particiate in the provision of cable television service as long as its participation does not constitute ownership and/or control as contemplated by the [1984] Cable Act." *See Telephone Company/Cable Televisin Cross-Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rulemaking,* 3 FCC Rcd 20 (1988). In effect, the Commission proposed removing the carrier/user restriction in its rules and replacing it with a bar on cognizable interests (an affiliation standard similar to the one the Commission employes for broadcast/cable cross/ownership).

Specifically, the Commission concluded that:

> The evidence before us suggests that the prohibition against telephone companies providing cable television service within their telephone service area no longer serves the public interest. Cable companies have access to approximately 80 percent of the nation's households, so a primary purpose of the current rule—preventing telephone companies from preempting cable companies—has been accomplished. The ban directly deprives consumers of video programming services telephone companies could provide, prevents operation of market incentives and achievement of efficiencies that could bring additional services to the public, and nonstructural alteratives to the prohibition, including accounting safeguards, appear likely to control telephone companies' potential anticompetitive conduct without depriving consumers of telephone company services. *Id.*

The comment cycle in this proceeding was concluded early in 1989.

III. ANALYSIS

A. Purpose of S. 2800

S. 2800, as introduced, was designed to spur the deployment of fiber optics in the United States and inject much needed competition in the video programming marketplace. At the same time, S. 2800, as introduced, was constructed to safeguard consumers and the ability to cable and other multichannel distribution systems to flourish and provide the viewing public with video programming.

The timely deployment of fiber optics to every business, school and home is essential to maintain American competitiveness in the Information Age, to provide the best possible education and training to our students and workers, and to bring advanced information services to Rural America.

The degree of competition in cable service and programming will determine the rate at which fiber optic deployment will occur in America. If this country continues antiquated regulatory policies which stifle competition in this critical field, the United States will fall behind other nations which, at this time, are accelerating the installation of fiber and fiber optic technology. The long-term consequences will be quite detrimental to our interests as a nation.

The Telecommunications Industry Association (TIA), which is composed of manufacturers of telecommunications equipment and components for both the cable and telephone industries, has determined through a comprehensive assessment of all studies on the subject, that deployment of fiber to every consumer is "stalled on the way to the home" under current government policies. The TIA assessment clearly and unequivocally demonstrates that fiber deployment will only be accelerated if telephone company entry into both cable service and programming is permitted.

S. 2800, as reported by the Committee, marks a significant first step to insuring that consumers have the advantages of the most modern telecommunications technology. In particular, passage of this bill should help to accelerate the deployment of fiber optics (and the related electronics) in local distribution markets. Coupled with fiber optic long distance networks, local fiber networks will form the critical infrastructure for the information economy.

B. Fiber Optics: The "Super Highway" of The Future

Simply put, fiber to the home, school and business is an essential infrastructure for economic development in the Information Age of the 21st century, just as railroads were in the last century and highways were in this century. As the economy shifted from agrarian-based to industrial-based, our ability to move goods via railroad first and highways later proved essential.

Now we are shifting toward a service-based economy in which the ability to transmit information will prove essential. Even today, over half of our GNP and employment are tied to the distribution of information.

Fiber optics is technologically the most effective "superhighway" for telecommunications:

> Fiber has enormous information carrying capacity—or what is technically called "bandwidth."

Once installed, a fiber network's information carrying capacity can be easily expanded by changing the electronics on the ends of the fiber.

Fiber is not subject to interference common to wire and radio transmissions.

Fiber cable is easier to install than wire because of it lighter weight—one-quarter pound of fiber does the work of 33 tons of copper wire.

Fiber systems are less expensive to maintain than wire systems.

As our economy comes to depend more and more on the ability of business, government and people generally to access, transport and manipulate information, a modern telecommunications infrastructure will become increasingly important. This is especially true of the public switched network which is universally available, interconnecting every business and nearly every home in the country. A nationwide web of fiber optic cables would reach into almost every home, tying into the network of fiber optic "superhighways" and connecting residences with large government and private institutions.

Moreover, as new telecommunications technology is developed, we must make certain that people in rural areas of the country are not left out. At the very least, policy makers must question any law or regulation which has the effect of retarding the deployment of new technology and the extension of new services in rural areas.

C. International Competitiveness In The Information Age

S. 2800 is not just a bill to deal with the telephone/cable cross-ownership prohibition. It is legislation which goes to the heart of our nation's ability to compete, in the future, in global markets.

Countries such as Japan and Germany are pushing ahead aggressively with the installation and use of fiber optics. Some countries appear to be ahead of the United States in deploying fiber in the local loop. These countries are making substantial investments in their telephone networks with the expectation that those investments will be recovered by selling the related technology abroad. Our nation must be competitive or risk importing the technology and exporting the jobs.

The installation of fiber and the development of broadband networks to every home, school and business in America will fundamentally improve our international competitiveness in the Information Age because it will bring new and different services with it that will improve our national productivity and our quality of life. These include, for example:

enhanced educational opportunities, especially for rural areas, through two-way interactive video education and training;

improved ability to move information intensive business tasks to rural areas with plentiful labor and lower living costs;

enhanced access by businesses of all sizes to product information, market data, research and other resources to enhance competitiveness;

improved ability to work at home in urban areas, thus reducing congestion on our Nation's highways;

reduced personal and business travel through at-home or business video teleconferencing;

improved medical care, especially in rural areas, through various techniques, including the transmission of X-rays and other medical imaging to major medical centers for immediate diagnostic interpretation;

improved ability for at-home banking and shopping via two-way video transmission; and

improved entertainment through HDTV and video programming with viewer choice on what to see and when to see it.

S. 2800 also addresses the need for economic development here at home. A modern telecommunications infrastructure can help attract and retain businesses which, in turn, means jobs and a stable tax base. These are especially important factors for rural areas.

D. Competition v. Re-Regulation

As we have seen in so many other areas of telecommunications, competition does a much better job than regulation of stimulating innovation and increasing consumer choice. The benefits of competition are substantial and can be highlighted as follows:

Competition (or even the threat of competition) can force cable operators to reduce rates. In fact, this has been the result of those few instances where competing firms have "overbuilt" incumbent cable systems.

Competition (or even the threat of competition) can force cable operators to expand their coverage and improve service quality. These objectives are much more difficult to accomplish through regulation. For example, many existing cable franchises require "universal service." However, without the spur of competition, those promises are not likely to be kept. Thus, competition could mean access to cable for millions of Americans in rural areas or urban centers who are denied it today.

Competition will expand the options for program providers who are currently forced to deal with a single cable company in each market. A number of large motion picture producers have endorsed telephone company entry into cable precisely for this reason.

Competition will benefit consumers by increasing program diversity and choice. Re-regulation may have the unintended effect of reducing new program options.

Some argue that competition for cable will come from over-the-air broadcasting, cable overbuilders, wireless cable (MMDS) and direct broadcast satellites (DBS). However desirable competition from those sources might be, it is unlikely to provide an effective check on cable's market power. For example:

The availability of broadcast stations has not provided a check on rates charged for cable networks and pay services.

Overbuilds have been few and far between, primarily because no major cable company wants to risk retaliation by overbuilding another system. Also, the cable industry has obtained legislation in many states which makes overbuilding more costly.

Wireless cable (MMDS) can only serve within the path of its signal which relies on line-of-sight. In addition, wireless cable has very limited channel capacity.

Direct broadcast satellites (DBS) has been a "promising technology" for over a decade, yet no systems have been deployed. DBS has literally not gotten off the ground. The systems currently being proposed are several years away from coming into existence (if they ever do). Also, the two major proposed DBS systems (Sky Cable and K Prime) are owned or controlled by cable interests and, as such, can hardly be expected to provide effective competition.

The one competitive alternative that has real promise (which helps explain the intensity of the cable industry's opposition to it) is the broadband network deployed by local telephone companies. While I would like to think that direct broadcast satellites (DBS) or "wireless cable" (MMDS) will be able to compete, I am skeptical. While I applaud the conclusion in the FCC's recent report to Congress that competition with cable should be encouraged, I am troubled by the Commission's inclination to rely on DBS and MMDS to provide that competition and by the Commission's delay in resolving its outstanding proceeding on telephone/cable cross-ownership.

Regulation alone will not adequately address consumer interests. Those who propose re-regulation of cable miss a key point about the 1984 Cable Act. The law's shortcoming was not that it deregulated cable rates, but that it erected a number of barriers to competition. As a result, there was no check on cable's ability to increase its rates. What some now propose as a remedy—re-regulation—will undermine the benefits of the Cable Act, while perpetuating its flaws—the barriers to entry.

E. S. 2800, As Reported By The Committee, Section-By-Section Analysis

With this in mind, S. 2800, as reported by the Committee, removes at least some of the impediments to telephone company provision of video. As reported by the Committee, the bill permits all telephone companies to provide "video dial-tone" service in their telephone service areas. It also requires the FCC to consider the benefits and costs of permitting telephone companies to have a more expanded role in the provision of video services to telephone subscribers. It requires the FCC to conduct a study and make a report to Congress on further changes in the law to facilitate telephone company provision of video services and to meet the needs of those consumers in rural America which will form the basis for additional action in the next Congress.

Section 1 of S. 2800, as reported by the Committee, requires the Commission to begin a proceeding within 60 days of enactment to examine the costs and benefits of S. 2800, as introduced. The Commission has on-going proposed rulemaking relating to its own telco/cable cross-ownership rules. That rulemaking proceeding need not, and should not, be delayed pending the outcome of the study required under Section 1. The Commission should also take the appropriate steps to conform its rules to the requirements of S. 2800, including the amendments to Section 621 made by the bill.

Section 2 of the bill permits any telephone company to provide "video dial-tone" service within its telephone service areas if the company has the capability to transmit video programming directly to subscribes as part of its telephone network. A telephone company is not permitted to have editorial control over, or other involvement in, the content of the video programming which it carries. As a necessary part of "video dial-tone" service, however, a telephone company must, at a minimum, to achieve the objectives of S. 2800 and to make such a service economically viable, be permitted to offer marketing services, billing and collection services, storage and transport services, and, in effect, a video gateway for services provided by others. Such a video gateway would permit telephone companies to provide welcoming screens, menus of available programming, and other navigational aids and features that emerge to facilitate use by consumers and programmers.

Section 2 also requires a telephone company to provide video transmission capability on a regulated common carrier basis, including nondiscriminatory access. The FCC and state regulatory commissions will establish regulations which will govern the offering of video transmission capability. No particular form of regulation is required, so long as nondiscriminatory access to the transmission capability is assured. Moreover, the bill does not distrub decisions already made by the FCC or state regulatory commissions which affect the regulatory status of any individual element of "video dial-tone" service.

Section 2 provides that, if the above conditions are met, neither a telephone company nor its customers (in this case, a video programmer or packager) are required to have a cable franchise. This removes ambiguities which exist in the current statute and in the Commission's rules. If not eliminated, these ambiguities might retard the development of broadband technology and the provision of "video dial-tone" service. There is no basis for requiring a telephone company to seek additional regulatory approval prior to modernizing its network. Similarly, there is no justification for subjecting users of that network to the franchise requirement any more than there is for placing such a requirement on those who use the network to transmit voice and data.

Section 2 further requires the Commission to complete a proceeding within one year to review its definition of "rural area" which is the basis for the rural exemption in the current statute.

The rural exemption to the telco/cable cross-ownership prohibition in Section 613(b)(3) of the Cable Act, as currently implemented by FCC rule (47 CFR Section 63.58), applies only to service "areas that include neither (1) incorporated or unincorporated places of 2,500 inhabitants or more, or any part thereof, nor (2) any other territory, incorporated or unincorporated, included in an urbanized area."

This current exemption threshold does not serve the original intent of Congress to encourage the prompt and efficient provision of cable television service in rural America. Many Americans live in areas that do not have cable television service but do not qualify for the rural exemption under the current 2,500 population threshold. Raising the threshold would allow local telephone companies the opportunity to fill this service void, as well as provide the in-

centive for the earliest possible deployment of modern broadband facilities and services in rural America.

Raising the population threshold of the rural exemption would also foster improvements in the level and quality of cable television service currently provided in rural communities. Rural communities are more likely to have access to cable systems that are older and of lower capacity than those in more urban areas. Telephone companies should be permitted to provide their communities with modern, high capacity cable television facilities.

State-of-the-art broadband facilities and services can alleviate the limitations and difficulties of rural life imposed by distance, remoteness and population disperison. Further, the deployment of advanced broadband technology can be a significant factor in the development of economically depressed rural areas as businesses looking to expand or diversify their operations are attracted to communities with business and residential communications services and facilities comparable to those available in more urban areas.

The FCC's current threshold of 2,500 population is based on a definition of "rural area" adopted by the Bureau of the Census some 40 years ago. Other federal laws and agencies have more recently adopted definitions of "rural area" that specify much higher threshold population levels. For instance, Section 501(a) of the Small Business Investment Act, as amended in 1988 (15 U.S.C. Section 695(a)) defines "rural areas" as localities with populations less than 20,000.

F. S. 2800, As Introduced

Concern about the importance of telecommunications infrastructure to the growth of our economy, to the competitiveness of our key industries and to the future of rural America warrants bolder action than we are taking with S. 2800, as reported.

The original version of this bill would have permitted telephone companies to provide the programming for a portion of their broadband capacity. To protect consumers and competitors (in this case, competing cable television companies and programming services), S. 2800, as introduced, contained a package of strict regulatory safeguards which addressed all of the legitimate concerns which have been raised by various parties to the telephone company entry debate. Such a structure was designed to ensure that telephone company entry will not prejudice competing technologies or consumers. It is very much a middle ground—a compromise—approach. While no regulatory scheme can remove *all* risk of anti-competitive behavior, any risks should be balanced against the benefits of telephone company entry (and of competition generally) as enumerated above.

The safeguards included:

the requirement of a separate subsidiary for the creation or packaging of affiliated programming so that telephone users will not subsidize the telephone company's cable service and programming operations;

the divestiture of the separate subsidiary if the telco engages in willful cross-subsidization, thus providing yet another disincentive for anti-competitive activity;

guaranteed access for unaffiliated programmers to no less than three-fourths of the channels of a telco cable operation;

the requirement for establishment of a "video gateway" so that unaffiliated, third-party program services will have access to a telco's integrated broadband fiber facilities on equal terms and conditions as the telco's affiliated program service;

the creation of a cost allocation/customer protection scheme to ensure that telco entry into cable does not result in higher rates to telephone ratepayers;

a prohibiition on buyouts of incumbent cable systems by a telco to preclude one monopoly from replacing another monopoly;

mandated carriage of all local broadcast signals on a must carry/no pay basis to help preserve "free over-the-air" broadcasting;

a requirement that telcos obtain a local franchise and pay franchise fees like traditional cable;

a limitation on the local franchising authorities' ability to unreasonably refuse to award a second competitive franchise.

a federal right of access to telco poles and conduits for the cable industry and;

a restriction that forbids telco employees from marketing the separate subsidiary's cable service.

Coupled with existing FCC safeguards, the original bill represented a balanced approach to letting telephone companies compete.

My concern was, and continues to be, that telephone companies have the opportunity and incentive to modernize their networks. While telephone companies are gradually deploying fiber optics in their networks, they have a tremendous investment in their copper facilities and little or no financial incentive to replace them more rapidly. An additional revenue stream from packaging and video programming services could very well be the economic justification. In addition, telephone companies need the freedom to package and program if they are to compete with an established cable television company which can do both and has a substantial headstart. The large cable companies are vertically-integrated; to deny telephone companies the same opportunity and still expect them to compete would be unfair. As shown in the TIA assessment, without the ability to stimulate usage of their own broadband network, telephone companies will not deploy fiber as rapidly. Consumers will lose the opportunity for new services, and the U.S. economy will lose jobs and its technological edge.

Telephone company competition can spur cable companies to respond by upgrading their own networks with fiber and by improving their customer service generally. We have already seen how just the threat of legislation to permit telephone company entry into video programming services has caused cable operators to accelerate their plans for fiber deployment as well as institute industry-wide technical performance and customer service standards.

G. Bush Administration and Bi-Partisan Congressional Leadership Support

S. 2800, as introduced, was co-sponsored by an impressive list of bi-partisan supporters including Senators Dole, Gore, Danforth,

Ford, Gorton, McCain, Lott and Bond. I was also pleased that the Bush Administration endorsed our original bill and that it was supported by manufacturers, the telephone industry, and many regulators.

The Bush Administration made clear its strong endorsement of S. 2800, as introduced, at a Senate Communication Subcommittee Hearing on S. 2800 on July 24, 1990:

> The Administration strongly supports S. 2800 because it will promote competition in the delivery of video services, and provide incentive of more rapid technological development of our telecommunication infrastructure. (Statement of Thomas Sugrue, Deputy Assistant Secretary of Communications and Information Policy, U.S. Department of Commerce TR. 20; see also, colloquy with Sen. Ford, TR. 44)
>
> The Administration believes S. 2800 is a sound and measured response to concerns about the current state of the cable industry. (TR. 25)
>
> The Administration believes that pro-consumer objectives can best be accomplished by expanding competitive in the provision of video services to the home . . . [this] is the fundamental virtue of S. 2800. (TR 20–21)
>
> Cable/telephone cross-ownership restrictions should be eliminated [thereby] ensuring that technology and marketplace developments, rather than government fiat, will determine the capabilities of our future telecommunications infrastructure. (TR. 22)
>
> S. 2800 makes [a] salutary change in current cable franchising practices by specifying that where a telephone company only provides video distribution facilities to unaffiliated programmers on a regulated common carrier basis, neither the company nor its customers need have a cable franchise. (TR. 22)
>
> Telephone company entry into cable could indirectly increase competition . . . because telephone company entry will multiply opportunities for competitive entry by independent program providers. (TR. 21)
>
> Other important benefits telephone company entry into cable would generate: increased incentives for telephone companies to construct broadband network facilities to carry programming to the house; [and] an increased array of voice data, and video services to subscribers. (TR. 21–22)

Senator Dole, the Minority Leader in the Senate, made the following comments in support of S. 2800 (S. 9312, Cong. Rec., July 10, 1990):

> I am pleased to be an original cosponsor of [S. 2800].
>
> I think the word for this legislation is "provacative." It is provacative in the best sense, in that it is intended to provoke action; to move this body off dead center in developing communication technology, enhancing our competitiveness, and opening up new pathways of information,

> education, and service for all Americans, in particular rural Americans.
>
> The future is not in excluding competitive technologies. It is in using all the available tools to provide the services that communities need and consumers want.
>
> Six years ago Congress freed it from its regulatory constraints so it could compete. That has enabled cable to attract investment, to grow, and to diversity. All of us have benefitted.
>
> It only seems reasonable that other ways of providing communications service get the same chance to compete.
>
> It just seems to me . . . that competition is the best answer. Regulation of the cable industry stunted its growth; competition provoked, if you will, growth and diversification. So that is the approach I favor. And that is why I hope that my colleagues will give thorough and serious consideration to this "provocative" bill.

Furthermore, this support has been bi-partisan in nature as is evidenced by the following statements from Senator Gore, the outstanding Democratic leader on this issue, made during the Senate Communications Subcommittee hearing on S. 2800:

> For sometime, I have been convinced that the only way cable consumers will ever be treated fairly is if competition is allowed to develop and thrive. (TR 10)
>
> Whatever the likely role of the telephone company in providing video services, it is unlikely to destroy the cable industry, and it could clearly help consumers and their communities cope with an undesirable incumbent cable operator. (TR 12)
>
> If fiber becomes ubiquitous in our telecommunications infrastructure, it does offer major benefits for consumer and video providers as well. In some instances where a cable operator has been particularly unresponsive to local concerns—and I can give some examples—a telephone company could provide competition as an overbuilder or, if invited by the franchising authority, compete for the franchise at renewal. (TR 11-12)
>
> I support S. 2800 because it will stimulate competition, because it does not violate the modified final judgment, because it could accelerate the development of a much-needed fiber optic network, and because the bill has the necessary safeguards to prevent cross-subsidies and other anticompetitive behavior.

IV. CONCLUSION

I am pleased that we can begin the process of introducing new competitors to cable while upgrading our nation's telecommunications infrastructure. I am confident the Congress will ultimately remove the legal and regulatory barriers to truly viable competition. For while I view S. 2800, as reported by the Committee, as a constructive and significant first step towards achieving the goals outlined in the Communications Act of 1934, it is not an end in itself. The issue is not about to go away.

S. 2800 is important because it recognizes that the only effective way to deal with cable's market power is to encourage competition and that telephone companies should be one of those competitors. By clearing the way for telephone companies to provide "video dialtone" service, the Committee has taken a constructive and significant first step towards making the video market more competitive. Along with my colleagues, including the Chairmen of the Committee and Subcommittee, I hope that this approach will foster the development of new services that can be delivered to subscribers over telephone company broadband networks. I hope this approach will stimulate telephone companies to accelerate their deployment of fiber optics to support these broadband services.

However, I am concerned that S. 2800, as reported, falls short of the steps needed to insure effective competition with cable and to provide the necessary spur for accelerated fiber optic deployment. As a result, I will continue to pursue bolder action which is necessary to ensure a state-of-the-art telecommunications infrastructure with broadband services available for all Americans.

Fiber can ultimately be brought to every home, school, and business if telephone companies have the right incentives, including the right to compete in the offering of video service. Telephone companies are in the best position to offer competition to cable. They serve 93% of all households and have an established reputation for reliable and responsive service. They have the resources to invest in new services. Moreover, telephone companies are already deploying fiber optics for inter-office trunking and feeder plant.

As the public switched network evolves from a copper-based system designed for voice to a fiber-based system capable of handling voice, high speed data and video, we can expect to see new telecommunications services develop. In addition to enterainment, there will be new applications for education, job training, health care, emergency services, and bank-and shop-at-home.

If these new services are to be widely available, the infrastructure needed to support them must be widely available. Otherwise, we risk creating a society of "haves" and "have-nots." Just as students in rural areas should have the same access to computers in the classrooms as their urban counterparts, consumers and business in rural areas should have access to the same telecommunications services and features.

With the passage of S. 2800, we can begin to create a public policy which encourages a modern telecommunications infrastructure. However, there is much more to be done by the Congress, the FCC and by state regulatory commissions if we are to maintain our position in the world and see the promise of new technology fulfilled for all Americans.

CONRAD BURNS.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

COMMUNICATIONS ACT OF 1934

Section 621 of that Act

GENERAL FRANCHISE REQUIREMENTS

SEC. 621. (a) * * *

(b)(1) Except to the extent provided in [paragraph (2)] *paragraphs (2) and (3)* a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3) If the public switched network of a common carrier, subject in whole or in part to title II of this Act, has the capability to transmit video programming directly to subscribers, if the common carrier has no editorial control over or other involvement in the content of the video programming, and if such capability is offered on a regulated common carrier basis, including nondiscriminatory access, neither the common carrier nor the users of that capability are required to have a franchise.

(c) through (e) * * *

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